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TRANSMITTED VIA E-MAIL

June 15, 2021

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Re: WSD Proposed 2021 Safety Certification Guidance – Reply Comments

Dear Director Thomas Jacobs:

The Utility Reform Network (TURN) respectfully submits these reply comments on the Wildfire Safety Division's (WSD)[1] proposed changes to the 2021 safety certification guidance ("Proposed Guidance") issued on May 11, 2021.

1. Introduction and Summary

Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas and Electric Company (SDG&E) (collectively "the utilities") claim that WSD's Proposed Guidance with respect to the "good standing" and wildfire mitigation plan (WMP) implementation requirements of Sections 8389(e)(2) and (7) are unlawful and contravene the statute. As these reply comments will show, the utilities' arguments find no support in the plain words of the statute and depend on the insertion of words and phrases that the Legislature chose not to include in these provisions.

In addition, the utilities' contentions are based on a one-sided portrayal of the history and purpose of the safety certification requirement that ignore the importance that the Governor's Office and Legislature placed on making the utilities accountable for their wildfire safety record and performance and for ensuring that the $10.5 billion ratepayer contribution to the Wildfire Insurance Fund is not depleted and exhausted by undeserving utilities.

If accepted, the utilities' arguments would render the safety certification requirements – which the utilities must satisfy to gain financial privileges worth billions of dollars -- virtually meaningless. Safety certification should not be a rubber stamp for the utilities. Accordingly,

[1] In these comments, WSD refers also to WSD's successor, the Office of Energy Infrastructure Safety.

TURN urges WSD to reject the utilities' erroneous arguments and to proceed with its Proposed Guidance, with the important and necessary modifications recommended in TURN's opening comments.

2. The Utilities' One-Sided Discussion of the History and Intent of AB 1054 Ignores the Important AB 1054 Goals of Utility Safety and Fairness to Ratepayers

The utilities present a decidedly one-sided view of the history and intent of AB 1054 and the safety certification requirement. The utilities' discussion reads as if the only goal of the Governor's Office and Legislature was to appease utility and Wall Street concerns, as if the utilities were the only parties whose interests were being considered and addressed.

Of course, this view is plainly incorrect, as the Governor's Strike Force Progress Report, which SCE relies upon in its comments, makes clear. As described by that report, the safety certification was a key element of a new "Power Company Safety Wildfire Accountability Standard," which the Governor's Office was working with the Legislature to create, which would:

- Mandate[] unprecedented safety investments without profit from power companies
- Force[] power companies to be accountable for wildfire safety record and performance
- Of all the solutions, will make Wall Street pay the most and have ratepayers and taxpayers the least.[2]

The report explained that "[t]he framework we will pursue maximizes shareholder contribution to a solution, minimizes ratepayer exposure to sticker shock rate increases and mandates a culture of safety in our utilities to prevent wildfires."[3]

This discussion tells a very different story than the utilities recite about the goals and interests that were being promoted in crafting the legislation that became AB 1054. The second bullet quoted above shows that requiring utilities to be "accountable" for their wildfire safety record and performance was a key consideration. And, as the third bullet shows, rather than kowtowing to Wall Street, the intent was to keep costs to pay for wildfire liabilities as low as possible for ratepayers and taxpayers, even if at the expense of shareholders and Wall Street. These goals of safety accountability and protecting ratepayers from unreasonable costs are considerations that the utilities fail to acknowledge in their comments.

Contrary to the utilities' glaringly incomplete narrative, TURN and other representatives of ratepayer and safety interests were extremely active and vocal in the negotiation of AB 1054.

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[2] June 21, 2019, Governor Newsom's Strike Force Progress Report, p. 7. The quoted discussion appears under the heading "Fair Allocation of Catastrophic Wildfire Damages." The report is available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1054

[3] *Id.*, p. 2.

After numerous meetings with legislators and the Governor's Office, in which TURN suggested many amendments to earlier drafts, TURN was finally able to support the final version of AB 1054 after it became clear that safety was sufficiently promoted and ratepayer interests were appropriately protected. It was made clear to TURN that securing TURN's support was extremely important to the bill's authors and legislative leadership.

Safety certification was a key provision to gain TURN's support. TURN had to swallow hard to support a bill with a relaxed burden of proof for utility prudence in causing wildfires, *which would only be allowed if a utility earned a Safety Certification*. The final wording of the safety certification provisions showed that WSD would have the authority to hold utilities to a high standard of safety before they could gain the benefit of that presumption of reasonableness through requirements that allowed WSD to exercise discretion, such as to determine whether a utility was in "good standing", had designed an executive compensation plan that "promote[d] safety as a priority," and whether the utility was implementing its WMP.

Moreover, the utilities' comments ignore the $10.5 billion sacrifice that AB 1054 requires ratepayers to make in the expectation of providing a long-lasting solution to the difficult problem of assigning responsibility for utility wildfire liability costs. From the ratepayer perspective, TURN accepted the proposition that ratepayers should share 50-50 in the capitalization of a Wildfire Insurance Fund that pays wildfire liability costs when utilities are not at fault. But TURN was not willing to accept that utilities could tap the fund and effectively gain a 50% ratepayer bailout for wildfires caused by unaccountable and unsafe utilities. Again, the safety certification requirement was key to ensuring a reasonable design of the Wildfire Insurance Fund. Only utilities that had shown that they were safe operators would be able to benefit from the presumption of prudence and the cap on repayment liability. Without a meaningful safety certification requirement, the future would be bleak: undeserving utilities could gain these benefits and deplete the Wildfire Insurance Fund to insolvency, rendering the AB 1054 compromise a short-lived solution that squanders ratepayers' $10.5 billion contribution and puts it in the pocket of under-performing utilities.

Thus, the utilities' revisionist history improperly invites WSD to ignore the fact that a low bar for safety certification would undermine the accountability and ratepayer protection goals that the Governor's Office and Legislature sought to promote. If the Wildfire Insurance Fund is to achieve its purpose of serving as a long-lasting solution to the funding of wildfire liabilities, utilities should only gain the full benefits from the safety certification to utilities with a record of wildfire safety and performance that justifies those privileges.

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3. The Utilities Incorrectly Claim that WSD's Guidance Contravenes AB 1054

a. The Utilities Misread Section 8389(e)(2) to Deny WSD Discretion to Allow Factors Other than Utility Implementation of the Most Recent Safety Culture Assessment to Inform the Good Standing Determination

The utilities challenge WSD's view that WSD has discretion to reject a safety certification if a utility has implemented the findings of its most recent safety culture assessment. In the utilities' view, WSD is powerless to deny a safety certification even when WSD is aware of evidence of violative and unsafe conduct showing that the utility does not warrant a finding of good standing. The utilities' statutory interpretation is wrong, and WSD is correct.

Section 8982(e)(2) requires that in order for the utility to secure a safety certificate, the WSD must find that:

> The electrical corporation is in good standing, which can be be satisfied by the electrical corporation having agreed to implement the findings of its most recent safety culture assessment, if applicable.

The fundamental problem with the utilities' interpretation is that it reads words into Section 8389(e)(2) that are not there. For the utilities' view to be valid, the statute would have to be written along the lines of the following:

> The electrical corporation is in good standing, which *shall be deemed to* be satisfied by the electrical corporation having agreed to implement the findings of its most recent safety culture assessment, if applicable.

However, the italicized phrase, "shall be deemed to" is not in the statute. Instead, the legislature chose the word "can," a word which confers on WSD the discretion to base its good standing determination on utility safety culture implementation *when the WSD in its informed discretion finds it appropriate to do so*. Thus, the plain words of Section 8389(e)(2) require WSD to find that the utility has satisfied the broad "good standing" standard, and allow WSD the discretion to determine whether utility agreement to implement its most recent safety culture assessment is sufficient to satisfy the requirement, or whether other factors that may be present also need to be considered.

It is also important to recognize – something PG&E's review of changes to the legislative language before passage fails to do[4] – that the introduced version of the safety certification requirement originally did not use the term "good standing" and merely required a finding of substantial compliance with the utility's most recent safety culture assessment.[5] This more

[4] PG&E Opening Comments, p. 4.
[5] As first introduced, the relevant requirement read: "The electrical corporation is in substantial compliance with the findings of its most recent safety culture assessment, if applicable." See PU Code §

limited and focused language was rejected. Instead, the revised language that was adopted in the final bill settles on requiring a broader, more discretion-laden finding of "good standing" that does not limit WSD solely to an examination of the utility's response to its safety culture assessment. Clearly, the Legislature wanted to leave room for WSD to deny a safety certification when a utility had shown that it could not be trusted to operate safely.

In sum, the plain language and evolution of Section 8389(e)(2) show the Legislature's intent to grant WSD discretion to determine whether a utility is in good standing, which "can" be based on utility agreement to implement the findings of its most recent safety culture assessment, but is not required to be so limited, and may consider other factors that bear on good standing. In our opening comments, TURN recommended additional criteria and information that WSD's final guidance should specify as matters that will be considered in WSD's determination of whether the good standing requirement has been satisfied. As TURN explained, these criteria should further the statutory purpose of extending the privilege of a safety certification – and its attendant benefits – only to utilities that have earned a presumption that they operate in a safe manner.

b. The PG&E and SCE "Safe Harbor" Interpretation of Section 8389(e)(2) Is Contrary to Both the Text and the Purpose of the Statute

Having argued that a utility's agreement to implement the findings of the most recent safety culture assessment should be determinative of good standing and cause to strip WSD of any discretion, PG&E (pp. 4-5) and SCE (p. 11) then contradict themselves by arguing that WSD does have discretion to apply other criteria if the utility chooses not to agree to implement such findings. PG&E and SCE refer to the "agree to implement" language as a "safe harbor" that the utility may activate if it so chooses, in which case WSD is not free to consider any other information that may have a bearing on the good standing requirement, even information that raises fundamental doubts about a utility's ability to operate safely. On the other hand, if a utility chooses not to implement one of more findings of its safety culture assessment, then PG&E and SCE believe that it would be appropriate for WSD to consider various factors and criteria, as determined by WSD, to determine whether good standing has been shown.[6]

8389(e)(3) in the 6/27/19 Senate amendments to AB 1054 that first introduced in legislation the concept of a safety certification, which can be found at:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1054

[6] In this regard, SCE directly contradicts the statement on page 4 of its comments where it asserts that the requirements of Section 8389(e) are "precise and do not involve discretionary judgments." Indeed, consideration of the factors listed in Section 2.2.3.2 of SCE's mark-up of the WSD Proposed Guidance document would clearly require a significant exercise of discretion by WSD to assess whether a utility has shown that it is in good standing. Similarly, by acknowledging that WSD has discretion to interpret and apply the good standing requirement if a utility does not agree to implement safety culture findings, PG&E as well contradicts its view (p. 9) that WSD's safety certification decisions should be predictable and based only on "black-and-white" criteria.

Neither the text of Section 8389(e)(2) nor the overall purpose of the safety certification in AB 1054 support an interpretation that allows *the utilities* to decide how the good standing requirement is applied. As previously noted, in its revisions to the original proposed language, the Legislature inserted the phrase "good standing" – which invites discretionary consideration of a broad range of factors that bear on a utility's ability to operate safely -- as a standard that WSD must apply. The overarching goal of improving utility wildfire safety would not be promoted by a scheme that allowed the utilities to preempt WSD's discretion to apply this standard if the utilities find they can agree to the recommendations of a safety assessment. WSD, not the utilities, should hold the cards in deciding whether the good standing requirement has been satisfied.

In any event, for purposes of the 2021 Safety Certifications -- for which WSD has stated that the results of assessments will come too late to be included in the large utilities' September 13, 2021 requests[7] -- PG&E and SCE are effectively conceding that WSD has discretion to develop criteria that interpret the good standing requirement. In TURN's opening comments, TURN urged WSD to develop more clear and comprehensive criteria for good standing that further the statutory purpose of ensuring that utilities only receive a safety certification if they have demonstrated that they are entitled to a presumption that they operate safely and prudently. TURN particularly urges WSD to adopt the four criteria that TURN enumerated at the top of page 4 of its opening comments, any one of which, if applicable, would create a rebuttable presumption that the utility is <u>not</u> in good standing.[8]

c. PG&E's Fear-Mongering About Scared Investors Should Not Influence WSD's Interpretation of the Good Standing Requirement

PG&E argues at length (pp. 7-10) that WSD must adopt PG&E's low bar approach to good standing – and safety certification generally -- because a more robust approach would "spook" investors (p. 4) and "impair utilities access to capital." WSD should reject this tired utility argument out of hand.

First, nothing in the text of Section 8389(e) supports the view that the Legislature intended Safety Certification to be an easily satisfied milestone in order to appease investors. As the label itself implies, a Safety Certification should mean that a utility has shown that it can be trusted to perform safely. Watering down the good standing provision and other requirements defeats the key statutory purposes of providing a strong incentive for utilities to conduct their operations safely and holding utilities accountable for their safety records.

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[7] WSD Proposed Guidance, p. 5.

[8] Because TURN proposed different criteria from the single "example" provided in WSD's Proposed Guidance, TURN will not respond to the utilities' criticisms of WSD's example, other than to reiterate that the Legislature intentionally chose a broad term, "good standing" and that WSD should have discretion to interpret that term to reflect that the Safety Certification is a distinction a utility must achieve to show that it warrants the benefits of such a certification.

Second, PG&E's argument amounts to a contention that WSD should never deny a safety certification because it would result in a downgrade of a utility's credit rating. Such an approach would absolve the utility of any responsibility for ensuring safe operations. Under PG&E's apparent worldview, *regulators* are to blame for its current depressed credit rating -- not PG&E with its multiple criminal convictions, probation violations, and billion plus dollar adverse enforcement decisions. The path to improving PG&E's credit rating is for PG&E to become a safer utility, not to approve safety certifications when the utility is unable to fulfill its safety obligations. WSD should be presumed to exercise its discretion wisely, and PG&E needs to accept that its poor execution of its obligations as a utility, not rogue regulators, are what would cause the denial of a safety certification.

PG&E's go easy approach would sap the incentive that the safety certification process was supposed to create for troubled utilities like PG&E to fix their safety problems. WSD is charged first and foremost with promoting wildfire safety. Any time a regulator threatens to take action that a utility perceives as against its financial interest, the utility will make this same impaired-access-to-capital argument. WSD must not let such contentions deter it from its statutory mission of promoting wildfire safety and protecting the public from unsafe utilities.

4. WSD Should Reject Utility Efforts to Preclude the Agency from Assessing the Quality and Effectiveness of Wildfire Mitigation Plan Implementation in the Safety Certification Review Process

Section 8389(e)(7) requires a utility requesting a safety certification to show that the utility "is implementing its approved wildfire mitigation plan." WSD proposes to base its determination regarding this requirement on a review of utility annual reports on compliance (ARCs), as reviewed by an Independent Evaluator (IE), and WSD's findings from field inspections and audits.[9]

SCE and SDG&E object to WSD's proposal. They interpret this requirement to preclude WSD from inquiring into the quality and effectiveness of the implementation of WMPs. As long as requisite advice letters with implementation reports have been filed, Section 8389(e)(7) must be deemed satisfied.[10]

The utilities' interpretation of § 8389(e)(7) is contrary to the plan words of the statute and would render this requirement meaningless. The statute does not say, as the utilities' interpretation erroneously assumes, that submission of the Tier 1 advice letters *conclusively satisfies* the requirement. Instead, it requires *WSD* to make a finding that the utility is implementing its approved WMP. Submission of quarterly utility reports that describe what the utility is doing in the name of WMP implementation do not mean the utility is satisfactorily implementing its WMP. That is a judgment-based determination that the Legislature reserved for WSD.

[9] WSD Proposed Guidance, p. 4.
[10] SCE Opening Comments, pp. 5-7; SDG&E Opening Comments, pp. 5-6.

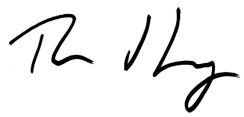
Furthermore, an interpretation that prevented WSD from inquiring into whether the utilities are implementing their WMPs properly and effectively would strip the requirement of any meaning. Given the breadth and complexity of WMPs, a utility can always truthfully report that it is doing *something* to implement its WMP. WSD needs to be able to base its determination on a finding that the utility is making a good faith effort to implement its WMP and is doing so effectively, not just performing work in the name of WMP compliance that is accomplishing little or no improvement in wildfire mitigation.

Accordingly, WSD should reject the utilities' interpretation of Section 8389(e)(7) and proceed with the approach outlined in the Guidance Proposal.

5. Conclusion

For the reasons set forth above, WSD should reject the utilities' objections to its Proposed Guidance. However, as discussed in TURN's opening comments, WSD should modify its Proposed Guidance to: (1) include the recommended additional criteria and information described in Section 2(b) of those comments for the good standing requirement; (2) add to the schedule a date that allows non-utility commenters at least 30 days to respond to the utility submissions; and (3) state that utilities will be required to respond to data requests regarding their safety certification submissions within three business days of the data request.

Sincerely,



Thomas J. Long, Legal Director

Cc: Service List for R.18-10-007